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Supreme Court, U.S.
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Docket Number _____

SUPREME COURT OF THE UNITED STATES

1998 October Term

*In re* WILLIAM H. VIEHWEG

On Petition for an Extraordinary Writ
to United States Court of Appeals for the Eighth Circuit

# PETITION FOR EXTRAORDINARY WRIT

William H. Viehweg
Petitioner
114 West 2nd South St.
Mt. Olive, Il 62069
314-999-5061

43pp

## QUESTION PRESENTED FOR REVIEW

Does Susan H. Mello, a defendant party in this civil action for legal malpractice, filed in the federal courts, have the legal standing to demand to be recognized, within said action, not as a pro se, but as an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing as legal counsel for herself, and does the court have the legal standing to so recognize her, and grant her all of said capacities' favorable inferences, presumptions, and standing, including the authority to sign subpoenas?

Alternatively, if Susan H. Mello and the federal court's do have the above said legal standing, does Mello's simultaneous standing before the court, and ultimately the jury, as both party litigant and as an officer-of-the-court advocate, as legal counsel for herself, not as a pro se, deny Viehweg, the non-attorney, pro se plaintiff, his right to equal justice, per the Fifth Amendment of the United States Constitution?

## PARTIES TO PROCEEDING

Petitioner William H. Viehweg, an individual, Plaintiff/Appellant.

Respondent Susan H. Mello, an individual, Defendant/Appellee.

Respondent Michael E. Gans, Clerk of Court, United States Court of Appeals for the Eighth Circuit.

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## TABLE OF CITED AUTHORITIES

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*Qualls v Field Enterprises Education Corporation*
302 F.Supp 152 (E.D. Mo 1969)
*Reed v Labor and Indus. Relations Com'm*
789 S.W. 2d 19 (Mo. banc 1990)
*Sappinton v Miller* 821 S.W.2d 901 (Mo. App. 1992)
*Utlaut v Glick Real Estate Co.*
246 S.W.2d 760 (Mo. 1952)
*Viehweg v Mello* ___ F.Supp ___ (E.D. Mo. 1998)

18 U.S.C. §912
28 U.S.C. §1291
28 U.S.C. §1332
28 U.S.C. §1651(a)
28 U.S.C. §1654

Fed. Rule of App. Proc. Eighth Circuit 27B
Fed. Rule of Civ. Proc. 11
Fed. Rule of Civ. Proc. 45
Fed. Rule of Civ. Proc. 73

Missouri Supreme Court Rule 4 - 3.7(a)

## CITATIONS

Only one opinion is due to be published in this case. That opinion was entered on final judgment at the trial court level, and does not address the issue in this petition.

*Viehweg v Mello* ___ F.Supp.___ (E.D. Mo 1998)

## BASIS FOR JURISDICTION

On August 24, 1998 the United States Court of Appeals for the Eighth Circuit denied the Petitioner's motion to disqualify Appellee Susan H. Mello from representing herself as an officer-of-the-court, legal counsel for herself, and to disqualify her counsel, Scott C. Harper and Karen M. Speiser, of the law firm of Brinker and Doyen.

On September 4, 1998, the appellate court denied the Petitioner's motion for reconsideration of the appellate court's above August 24th ruling.

This Court has jurisdiction to review the above August 24, 1998 order per 28 U.S.C. §1651(a).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against themself, nor be deprived of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

On February 10, 1997 petitioner William H. Viehweg filed a complaint against the respondent Susan H. Mello in the United States District Court, Eastern District of Missouri, Eastern Division. Jurisdiction was based on diversity of citizenship, 28 U.S.C. §1332. The complaint alleged three counts of legal malpractice, two for negligence, and one for constructive fraud, and demanded a jury trial.

Per Federal Rule of Civil Procedure 73, the case was assigned to Magistrate Judge Thomas C. Mummert.

On March 14, 1997 Mello entered her personal appearance, through her first counsel, Brian Plegge of Moser and Marsalek, by moving to dismiss.

On April 10, 1997 Mello entered her attorney appearance as co-counsel for herself. Said appearance states the following:

> " Comes now Susan H. Mello and enters her appearance as co-counsel for the Defendant (with Brian Plegge designated lead counsel with Plaintiff directed to contact lead counsel)".

The trial court docket listed Mello's entry as "ATTORNEY APPEARANCE as co-counsel for defendant Susan H. Mello by Susan H. Mello".

On June 24, 1997 Viehweg moved for sanctions, per Fed. Rule Civ. Proc. 11, pertaining to Mello's entry of appearance, arguing the following: "though the defendant may rightfully represent herself pro se, she may not under the false representation of an attorney representing her client." Said motion included as an exhibit a May 23, 1997 letter Mello sent Viehweg stating the following:

> "the requirement to "serve" me with copies is not due to my status as a party, but as counsel. Rule 5(b) covers only those situations where there is a party or counsel, not where a party is also counsel." As with any multiple counsel situation, unless you obtain an order limiting service under Rule 5(c), it is not sufficient to send copies only to Mr. Plegge and will not be considered

proper or timely service."

Mello responded by filing two motions to strike. On December 2, 1997, the trial court summarily denied Viehweg's motion.

On October 15, 1997 Viehweg moved to quash Mello's entry of appearance as counsel for herself, arguing the following:

"That as the State of Missouri does not recognize self-representation as the practice of law, see Reed v Labor and Indus. Relations Com'm 789 S.W.2d 19 (Mo. banc 1990), Ms. Mello cannot, by law, appear as legal counsel for herself."

Mello responded by attempting to file a motion to strike said motion, but the trial court refused to accept her filing (docket 110). On December 2, 1997, the trial court summarily denied Viehweg's motion.

On November 10, 1997 Viehweg moved to quash three subpoenas ordering production of documents subject to the privilege of confidentiality, arguing that said subpoenas

"are void on their face as having violated Rule 45 by being issued, not by the defendant's attorney, Mr. Plegge, as an officer of this Court, or by the Court Clerk, but by Susan H. Mello, personally, who as a party to this action, is without authorization to issue subpoenas."

On December 2, 1997, the trial court denied said motion.

On November 17, 1997 a pre-trial motion hearing was held before Magistrate Judge Thomas C. Mummert, and that the following are excerpts from the transcript of said hearing, with said transcripts having been filed in the appellate court as the record on appeal:

BEGINNING OF TRANSCRIPT

<u>On the issue of Mello's self-representation</u>

Page 12, line 13 through Page 13, line 10

THE COURT: The second issue is the issue that's been plaguing this lawsuit, -- no offense to Mr. Plegge, but plaguing this lawsuit from the beginning, and that is Ms.

Mello's dual position as a litigant and as an attorney. Ms. Mello has the right, Mr. Viehweg, to represent herself. She has a right to represent herself whether she's a lawyer or not a lawyer, but the fact that she is a lawyer doesn't preclude her from being an attorney. The case you cite is not on point and has nothing to do with this lawsuit. The case you cite of Reeve vs. Labor and Industrial Relations deals with someone representing a corporation as a - - an attorney has to come in and represent a corporation. A corporation cannot represent itself. You certainly have a right to represent yourself, as does Ms. Viehweg, - - I'm sorry, Ms. Mello. So, she certainly has that right to do that. I really don't want a response, I'm just telling you what I'm doing here. So, your Motion to Strike her as an attorney and all the frivolous motions you've filed about that, and all the cases, denied. She has a right to represent herself, okay? Now, I'll agree with you to some extent, Mr. Viehweg, I don't think it's the most intelligent decision ever made in the history of juris prudence, but that's her call, okay? She has a right to do that.

On the issue of Viehweg's pro se status

Page 16, line 9 through 18

THE COURT: From now on, getting back to pleadings, more specific, it seems that every time there's a motion filed by Ms. Mello's side of the table I have to look at all of the lawsuits that Mr. Viehweg has filed since he's been alive I don't want to see those anymore. I understand that he's filed these lawsuits. You know, we aren't the brightest people down here, but we can figure it out after a certain period of time. I know there's a lot of lawsuits, I don't need to, -- it doesn't need to be repeated each time the case comes before me with a motion. So, stop that.

On the issue of Viehweg's pro se status

Page 19, line 16 through Page 20, line 6

Page 21, line 3 through 8

MR. VIEHWEG: I don't oppose to taking a (35) Exam if I'm asking for emotional distress. My concern with the initial request was that it didn't have any limitations.

THE COURT: It was unlimited.

MR. VIEHWEG: And when I read the memorandum of law it looked like they were trying to rule me incompetent.

THE COURT: Mr. Viehweg, you hit the next issue I want to address. That Rule 35 Exam is gonna be limited to whether or not Mr. Viehweg has suffered an emotional distress as a result of the actions of this, -- were precipitated by this lawsuit. We're not gonna get into, -- I can't imagine an MMPI being, -- I mean, the request that was made by the Defendants in this case was extremely over broad. This is not a question of whether or not Mr. Viehweg is incompetent because he's filed a bunch of lawsuits, that's not the issue in this case.

and Page 21, line 3 through 8

THE COURT: What I'm precluding the Defendants from getting into is it appears to be, based on their motions, is that they're saying, "Hey, this guy's filed a bunch of lawsuits so he's obviously, -- there's something wrong with him," and that issue is not before the Court, -- or I won't accept it as before the Court. Okay.

On the issue of depositions

Page 22, line 1 through 12

MS. MELLO: Your Honor, I realize that that's unusual relief to ask for. I'm very afraid of Mr. Viehweg. I put that in my Supplemental Motion. This is not a matter that the man has filed a number of lawsuits, if you read them they're frightening. He's called my home, even after I asked him not to. I am afraid that in the course of the deposition where I'm sworn to tell the truth, if he asks me for an opinion it will fester, it will escalate, and it will end up in domestic, -- some kind of violence. I am very physically afraid, that's why I've asked the Court to give me an opportunity for written questions where I can weigh what is said to him so it may not antagonize him.

and Page 22, line 20 through 21

MR. VIEHWEG: I can say that I haven't done anything.

and Page 23, line 16 through 19

THE COURT: I'm not sure there's any evidence

before the Court that that fear is documented, but I appreciate the fact that people do get upset and things can happen.

END OF TRANSCRIPT

On May 26, 1998 the trial court granted Mello's motion for summary judgment ruling in her favor on all three counts.

On June 24, 1998 Viehweg filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit with appellate jurisdiction under 28 U.S.C. §1291.

On June 30, 1998 Viehweg filed with the appellate court his locally required Information Form A, which stated that one of the issues on appeal would be whether a party litigant can simultaneously be recognized by the court as an officer-of-the-court advocate.

On July 16, 1998 Mello, having already responded through counsel Scott C. Harper of Brinker and Doyen, filed her entry of attorney appearance with the appellate court as co-counsel for herself. That said notice of appearance did not contain proof of service, and that no service was made upon Viehweg.

On July 23, 1998 Viehweg filed his motion suggesting that the appellate court request amicus curiae briefs from bar associations on the issue of whether a party litigant can simultaneously be recognized by the court as an officer-of-the-court advocate. The appellate court clerk denied said motion per Eighth Circuit Rule 27B(a).

On August 19, 1998 upon Viehweg just discovering that Mello had entered her appearance, Viehweg filed his motion with the appellate court to disqualify Mello from acting as an officer-of-the-court, to disqualify her counsel, Scott C. Harper and Karen L. Speiser of Brinker and Doyen, and for a protective order prohibiting Mello from referring to herself as "counsel for". Mello filed a response requesting sanctions, stating:

> "Appellant fails to direct this court to any statute or court rule stating that Appellee Mello may not enter

her appearance as counsel on her own behalf. Appellee is unaware of any such statute or rule preventing a party from acting as her own counsel if she is a licensed attorney".

On August 24, 1998 the appellate court summarily denied Viehweg's motion to disqualify Mello. Said order was entered by the Court Clerk, Michael E. Gans, per Eighth Circuit Rule 27B(a)

On August 27, 1998 Viehweg requested reconsideration of said order by a judge, per Eighth Circuit Rule 27B(a). Mello filed a response requesting sanctions, stating "Appellant should be barred from filing any further frivolous motions and his conduct sanctioned by this Court".

On September 4, 1998 the appellate court summarily denied Viehweg's request for reconsideration. Said order was entered, again, by the Court Clerk, Michael E. Gans, at the direction of the Court.

On September 8, 1998 Viehweg filed a motion with the appellate court to stay the briefing schedule until such time as Viehweg could petition to this Supreme Court for an extraordinary writ.

On September 14, 1998 the appellate court summarily denied Viehweg's motion to stay the briefing schedule. Said order was entered by the Court Clerk, Michael E. Gans, per Eighth Circuit Rule 27B(a).

## ARGUMENT

An individual can not act as an agent of a department of the United States without legal authorization. Therefore the burden is on Mello, as a defendant party in this civil action for legal malpractice, filed in the federal courts, to cite law showing that she has the legal standing to demand to be recognized, within said action, not as a pro se, but as an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing, within the practice of law, as legal counsel for herself. The burden is also on the federal

courts to cite law showing that they have the legal standing to so recognize Mello, and grant her all of said capacities' favorable inferences, presumptions, and standing, including the authority to sign subpoenas.

Further, as the federal courts have a duty to avoid even the appearance of partiality, the burden is on the courts to show that, by their recognizing Mello's self-representation, not as that of a pro se, but as that of an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing, within the practice of law, as legal counsel for herself, the courts do not deny Viehweg, a non-attorney, pro se plaintiff, his right to equal justice, per the Fifth Amendment of the United States Constitution.

Though the burden is upon Mello and the courts, neither has cited a single law supporting their actions. In fact, case law is strangely absent any cases, in any court, on any level, on this issue. Even Corpus Juris Secundum is silent. What law does exist, runs contrary to Mello's and the court's actions. Thus the need for The Supreme Court to directly address this issue, decide with opinion, and promulgate it.

Any authority that Mello may exert as an attorney stems from her license from the State of Missouri to practice law. The court's ability to recognize her appearance in any action as an advocate on behalf of a party litigant stems from said law license. Isn't it reasonable to question whether Mello's self-representation constitutes the practice of law?

The right to practice law is not a natural or constitutional right, nor unqualified or absolute right. It is a privilege burdened with conditions.

The case of *Reed Vs. Labor and Indus. Relations Com'm* 789 S.W.2d 19,21 (Mo. banc 1990) contains the Missouri Supreme Court's definition of the practice of law, as follows:

> "[One] is engaged in the practice of law when he, for a valuable consideration . . . appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner,

referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. "

As per the above definition, Mello, in order to be engaged in the practice law, must have a client. It is also well established under Missouri law that an attorney/client relationship is an agency relationship requiring manifestation of consent between two persons. *Sappington v. Miller* 821 S.W.2d 901,904[8] (Mo.App. 1992); *Anderson v Pryor* 537 F.Supp 890,894[1][2] (W.D. Mo. 1982); *Qualls v Field Enterprises Education Corporation* 302 F.Supp 152,153[3] (E.D. Mo. 1969) *Markland v Travel Travel Southfield* 810 S.W.2d 81,83 [2] (Mo.App. 1991); *Utlaut v. Glick Real Estate Co.* 246 S.W.2d 760,763[2] (Mo. 1952).

As Mello is only one person, she cannot by law have an agency relationship with herself, and therefore can not consider herself a client. As Mello does not have a client, her self-representation does not constitute the practice of law. As Mello's self-representation does not constitute the practice of law, her self-representation derives no legal authority from the State of Missouri. Absent said legal authority, Mello is not only is without legal standing to demand the court to recognize her as an officer-of-the-court advocate, legal counsel for herself, but her actions are more appropriately described as the illegal practice of law.

*Black's Law Dictionary* describes the term "counsel for" as one person, an attorney, who represents another person, the client. It describe's self-representation as *pro se*. Mello's use of the term "counsel for" to describe her own self-representation is misrepresentation.

Besides, even if Mello's self-representation could be considered the practice of law, she could not ethically enter her appearance on behalf of herself. Missouri Supreme Court Rule 4, concerning professional conduct, Rule 3.7(a), prohibits an attorney from entering an appearance as counsel on behalf of a client, when the attorney is a primary witness

in the case. Mello is the primary witness in Viehweg's action against her for legal malpractice.

Further, the federal courts, under federal statute 28 U.S.C.A. §1654, provide Viehweg and Mello, as equal parties, only two options. They can either plead and conduct their cases personally, pro se, absent any negative presumption or inference from such standing, or they can plead and conduct their cases through counsel. If Mello were allowed to plead and conduct her own case, personally, as an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing, within the practice of law, as legal counsel for herself, her elevated pro se status would violate said statute by creating a negative inference on Viehweg's pro se status. For instance, how would Mello's status be explained to the jury without disparaging Viehweg's?

Thus we come to the question of how Mello, a party, could have legally authorized subpoenas requiring the production of documents? Federal Rule of Civil Procedure 45(a)(3) provides parties requiring subpoenas with two options. Option one is to obtain a subpoena signed by the court clerk. Option two is to have their legal counsel sign the subpoena. There is no legal authority for Mello, as a party, to sign subpoenas.

Consider what would have happened had Viehweg, a party, signed a subpoena. He would have committed a felony. Federal statue 18 U.S.C.A. §912 provides that anyone who falsely assumes or pretends to be an officer acting under the authority of a department of the United States, and demands the production of documents, shall be fined, and/or imprisoned up to three years. Therefore, as both Viehweg and Mello are parties, and the courts have a duty to treat them equally, didn't Mello commit a felony by signing the subpoenas?

The courts not only have a duty to avoid partiality, they have a duty to avoid even the appearance of partiality. In this case, the federal courts must concern themselves with the public's perception of the courts' willingness to avoid

partiality toward one of their own.

In an analogy to the *average man test*, certainly an ordinary federal judge, being first and foremost an attorney, is so disconnected from Viehweg's representative group (non-attorneys), and so connected with Mello's representative group (attorneys), that he would be biased against Viehweg without even recognizing his prejudice. In this case, as Mello is a pro se attorney and member of the trial and appellate court's bar, and as Viehweg is a non-attorney pro se, certainly the court's duty to avoid even the appearance of partiality is heightened.

Mello's entry of appearance as legal counsel for herself was, at the minimum, made in bad faith. Mello is held to have known that the status of party and the status of legal counsel appearing for a party, are mutually exclusive. Why need did Mello have to demand recognition as counsel for herself? What legal need would not be provided her by the court in her proper status as pro se. Mello could only have entered her appearance as counsel for herself to wrongfully avail herself of all of said capacities rights, preferences, favorable presumptions,and special standing, and thereby favorably differentiate her self-representation from Viehweg's self-representation.

Viehweg's right to equal justice, before an unbiased and unprejudiced court and jury, guaranteed him by the Fifth Amendment of the United States Constitution, precludes the courts from recognizing Mello, or allowing Mello to seek recognition, as anything other than her proper self-representative status, exactly equal to Viehweg's, a party litigant appearing pro se.

Mello's insistence in attacking and disparaging Viehweg's status as pro se, all the while refusing to represent herself in her proper status as pro se, and falsely representing herself as legal counsel, amounts to intentional obstruction of justice. The only purpose Mello could have had for such actions was to wrongfully bias and prejudice the court, the jury, and any and all witnesses in her favor, and against Viehweg. Such suborning of partiality is unlawful per se.

Mello's attorneys, Scott C. Harper and Karen M. Speiser, of the law firm of Brinker and Doyen, are held to have known that their client's entry of appearance as legal counsel for herself pursued an injustice. They are held fully liable for their client's wrongful conduct. They not only knowingly condoned her wrongful actions, they defended her wrongful actions.

The courts should not be made a party to injustice. The trial court, by recognizing Mello as legal counsel for herself, denied Viehweg equal justice. When Viehweg appealed to the appellate court to address the issue of Mello's representation, the appellate court recognized her as legal counsel for herself. Viehweg can not receive equal justice in the appellate court if Mello is recognized as legal counsel for herself. Viehweg has no court left in which to seek justice, other than The Supreme Court. The burden should not be placed on Viehweg to have to demand equal justice.

Obviously, one of the biggest problems in this issue is the lack of a controlling citation. It is reasonable to conclude that Mello would probably never have even attempted to demand recognition as legal counsel for herself, nor the courts so recognizing her, had their been a decisive authority on the issue. It is reasonable to conclude that absent such a citation from The Supreme Court, such injustice will became a plague upon these honorable courts.

## CONCLUSION

Mello had no legal standing to enter her appearance as legal counsel for herself. The courts have no legal standing to so recognize her. Such recognition of Mello by the courts violates Viehweg's constitutional right to equal justice, per se. Mello, and her attorneys, knowingly pursued an injustice. Absent The Supreme Court's exercise of its supervisory powers, such injustice will be summarily condoned by the federal courts.

Viehweg prays for a writ prohibiting Mello from representing herself as legal counsel for herself in this case, and for a writ of mandamus ordering the Eight Circuit Court of Appeals Clerk, Michael E. Gans, to strike Mello's entry of appearance as legal counsel for herself, to disqualify attorneys Scott C. Harper and Karen M. Speiser and their law firm of Brinker and Doyen from representing Mello in this action, and to strike any and all pleadings, motions, and/or documents that were filed by Mello and/or her attorneys and in any manor refer to Mello as legal counsel for herself, and, lastly, for whatever other relief this Honorable Court deems proper.

Respectfully submitted,

William H. Viehweg,
Petitioner
114 West 2nd South St.
Mt. Olive, IL 62069
(313)-999-5061

# APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 98-2732EMSL

William H. Viehweg,
Appellant,
v
Susan H. Mello,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Missouri

The motion of the appellant for reconsideration of the Court's August 24, 1998 order is hereby denied.

September 4, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

No. 98-2732EMSL

William H. Viehweg,
Appellant,
v
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Appellant's motion to disqualify appellee, her lawyers and their law firm is denied.

August 24, 1998

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

No. 98-2732EMSL

William H. Viehweg,
Appellant,
v
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Appellant's request that this court solicit amicus curiae briefs from bar associations is denied. This denial is without prejudice to either party soliciting amicus curiae briefs solely through their own efforts.

July 29, 1998

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

28 U.S.C.A. §912:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

28 U.S.C.A. §1654:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Federal Rule of Civil Procedure 45(a)(3):

The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

Missouri Supreme Court Rule 3.7(a):

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

United States Court of Appeals
Eighth Circuit

William H. Viehweg,
Plaintiff/Appellant

v No. 98-2732EMSL

Susan H. Mello,
Defendant/Respondent.

ENTRY OF APPEARANCE

Comes now Susan H. Mello and enters her appearance as co-counsel for Defendant.

Respectfully submitted,

by: (Signature)
Susan H. Mello,
7751 Carondelet, Suite 403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Home No (314 721-3926
Co-Counsel for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

William H. Viehweg
Plaintiff,

v. Cause No. 4:97CV00211 TCM

Susan H. Mello,
Defendant.

Entry of Appearance as Co-Counsel

Comes now Susan H. Mello and enters her appearance as co-counsel for the Defendant (with Brian Plegge designated lead counsel with Plaintiff directed to contact lead counsel).

Respectfully submitted,

By S. Mello (signature)
MO #31158
USDC #3841
7751 Carondelet, #403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Co-Counsel for Defendant

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

WILLIAM H. VIEHWEG,
Plaintiff / Appellant

v. Appeal No. 98-2732EMSL

SUSAN H. MELLO,
Defendant / Appellee

**MOTION FOR AMICUS CURIAE BRIEF**

Comes now appellant, William H. Viehweg, and in support of his motion for an amicus curiae brief states as follows:

1. That at issue in this appeal is whether a defendant party in a civil action, who happens to be an attorney, can not only represent herself pro se, but can also demand to be recognized by the trial court as an officer of the court, with all of said capacities' favorable presumptions, privileges, and rights, without tipping the scales of justice against the plaintiff, without requiring a new exemption of current state law, and without requiring new exemptions from professional rules on ethics.

2. That in the instant action, Ms. Mello, a Missouri attorney and member of the trial court bar, is the defendant in this legal malpractice action brought by a former client. Ms. Mello chose to represent herself pro se, in addition to having legal representation provided by her insurance company. But she also filed an appearance as counsel for the defendant (herself), demanding recognition as an officer of the court. Mr. Viehweg, the former client, who is not an attorney, filed the action as a pro se.

3. That in her demanded status as an officer of the court, Ms. Mello refused to refer to herself as the defendant, instead referring to herself only as counsel for the defendant, refused to accept proper service of papers by Mr. Viehweg, refused to appear for a properly noticed deposition, wrongfully attacked Mr. Viehweg's status as a pro se by filing a frivolous and malicious motion challenging his mental competency and requesting a guardian ad litem be appointed for him, repeatedly attacked Mr. Viehweg's status as a pro se by falsely and maliciously alleging through motions, affidavits, and oral arguments that she was afraid for her personal safety, and even authorized subpoena's by personally signing them as an officer of the court.

4. That Mr. Viehweg properly responded to Ms. Mello's wrongful actions by filing motions for the following: seeking sanctions for her wrongful conduct; to disqualify her as an officer of the court (not as a pro se); and to quash the subpoenas. That all of Mr. Viehweg's motions for relief were opposed by Ms. Mello, and denied by the trial court.

5. That Mr. Viehweg will argue in this appeal that the law does not allow, nor will it countenance, a defendant party, such as attorney Ms. Mello, wrongfully cloaking herself in the favorable attributes and privileges accorded officer of the court status, for the following reasons:

a. That in order for defendant party Ms. Mello to also stand in the capacity of an officer of the court, the blind scales of justice must be illegally tipped in her favor.

b. That in order for an attorney to enter an appearance in a civil action, that attorney must have a client who is, in some manner, a party to the action. Yet Ms. Mello has no client. Therefore, in order for Ms. Mello to be able to enter her appearance as an officer of the court without a client, the rule must be changed or an exception made.

c. That attorneys only act as officers of the court when they are engaged in the practice of law. Missouri law states that self representation is not the practice of law. Ms. Mello is merely representing herself. Therefore, in order for Ms. Mello to be recognized as an officer of the court - an

attorney engaged in the practice of law - Missouri law will have to be changed to recognize self-representation by attorneys as the practice of law.

d. That Missouri Supreme Court rules on ethics require not only that attorneys be objective, but that they refuse representation in matters in which they can not be objective. There is no matter less objective and more subject to an attorney than one involving the attorney as a defendant in a legal malpractice action for fraud. Therefore, in order for Ms. Mello to be allowed to stand as an officer of the court, in a legal malpractice action for fraud in which she is the defendant, the Missouri rules on such ethics will have to be waived, or ignored.

e. That Missouri Supreme Court rules on ethics require attorneys to refuse representation in matters in which they may be called as a witness. The rule is based upon the fact that when legal advocates become witnesses, the trier of fact is rightfully mislead, and the opposing party is unfairly prejudiced. Therefore, as Ms. Mello is one of two primary witnesses in this action, in order for "witness" Mello to be allowed to stand as an officer of the court "advocate", Missouri rules of ethics will have to be waived, or ignored.

f. That Missouri Supreme Court rules of ethics prohibit attorneys from offering any advice to a pro se, other than, that the pro se seek professional representation. Said prohibition is based upon the common sense that a parties' own subjective involvement in a legal action prohibits sound reasoning. Thus the birth of the legal profession - legal advocacy based upon objectivity. Therefore, in order for Ms. Mello to be allowed to stand as an officer of the court, Missouri rules of ethics will have to be waived, or ignored.

g. That denying an attorney dual status as a party and as an officer of the court can not prejudice the attorney. That as a pro se, an attorney/party has all of the same rights and privileges accorded any pro se.

6. That in the instant case, Ms. Mello's wrongful demand to be recognized as an officer of the court is

especially vile considering her unrelenting malicious attacks against Mr. Viehweg's status as a pro se (a status that is protected by the constitution and federal statute).

7. That this Court's ruling in this matter will be a precedent. That there are no court rulings directly on point (in fact, there are virtually no court rulings) as to this matter of whether a party to an action can simultaneously act as an officer of the court. That this appellant believes this scarcity of cases is simply because no attorney has ever had the audacity to attempt such a breach of justice, law, and professional ethics. That neither Ms. Mello, nor the lower court, has ever provided one scintilla of law in support of allowing her to act as an officer of the court.

8. That this Court's ruling will be law, hopefully rebalancing the scales of justice in this action, and any and all such future actions, and affecting and binding all lawyers potentially subject to its jurisdiction from such wrongful actions.

9. That it is not reasonable that Ms. Mello, alone, represent the potential interests of all attorneys subject to this Court's jurisdiction. That if any legal argument can be made in behalf of her, or any attorney/party, status as an officer of the court, it should be made in behalf of all those affected. If Ms. Mello, as a defendant, has the legal right to act as an officer of the court, certainly the Missouri Bar Association, as well as any other bar association that may be so affected by this Court's decision, will want to present such arguments and citations in her behalf, as well as on behalf of all the other lawyers who may wish to exercise such a right in the future. Certainly, if there is such a right, the Missouri Bar Association could provide the legal arguments and citations supporting it.

10. That appellant Viehweg hereby consents to a amicus curiae brief, by any state or national bar association, that the appellee, and, or, the association, wishes to file, in both Ms. Mello's support and on this issue.

11. That appellant Viehweg moves that, as provided for by FRAP 29, this Court request briefs, on this issue, from

all such bar associations as may be affected by this Court's decision, and that said briefs not be limited in their support of either party, but focus more on upholding the scales of justice and professional ethics.

**Therefore**, appellant Viehweg prays that this Court request amicus curiae briefs from the Missouri Bar Association, and other affected bar associations, on the issue of whether an attorney/party to a civil action can simultaneously stand in the capacity of an officer of the court, without violating justice, law, ethics, and professional common sense.

Respectfully submitted,

William H. Viehweg (signature)
William H. Viehweg
114 West 2nd South
Mt. Olive, IL 62069
1-217-999-5061

United States Court of Appeals
Eighth Circuit

William H. Viehweg,
Plaintiff/ Appellant

v Appeal No. 98-2732EMSL

Susan H. Mello,
Defendant/ Appellee

MOTION TO DISQUALIFY
Susan H. Mello, Scott C. Harper, Karen M. Speiser and
The Law Firm of Brinker and Doyen
and
Motion for Protective Order

Comes now appellant William H. Viehweg and in support of his motion to disqualify Susan H. Mello, Scott C. Harper, Karen M. Speiser, and the law firm of Brinker and Doyen, and for his motion for a protective order, states as follows:

1. That on July 16, 1998 Susan H. Mello entered her appearance in this case as "co-counsel for the defendant", a true copy of which is attached as Exhibit 1.

2. That appellant was not aware of Ms. Mello's said entry of appearance until August 17, 1998 when he personally viewed this court's file. That said entry contains no certificate of service. That appellant never received service.

3. That the appellee, Ms. Mello, is a party to this case who also happens to be an attorney, licensed by the State of Missouri, and a member of the trial Court's bar. Mello is represented on this appeal by counsel, Scott C. Harper and Karen M. Speiser of the law firm of Brinker and Doyen.

4. That the appellant, Mr. Viehweg, is a party to this

case who also happens to be a non-attorney. Viehweg appears pro se on this appeal.

5. That this Court has a duty to avoid even the appearance of partiality. In an analogy to the *average man test*, certainly an ordinary judge, being first and foremost an attorney, is so disconnected from Mr. Viehweg's representative group (non-attorneys), and so connected with Ms. Mello's representative group (attorneys), that he would be biased against Viehweg without even recognizing his prejudice. In this case, as the appellee is an attorney and a member of the trial Court's bar, and as the appellant is a non-attorney pro se, this Court's said duty is heightened. See HUTCHINSON V GERTSCH App., 159 Cl.Rptr. 40,49 (1979) as to the standard set in California trial courts when an attorney is in court as a litigant.

6. That, at any time in this case, should Ms. Mello choose to not be represented by and through her counsel, but by and through herself, her status, by default, is pro se, the same as the appellant's.

7. That Ms. Mello, by and through her entry of appearance as counsel of record, seeks recognition and standing in this case as an officer of this Court, in order to avail herself of all of said capacities rights, preferences, favorable presumptions, and special standing.

8. That the term "co-counsel for defendant" is reasonably defined as: one person, an attorney, who represents another person, her client. That Ms. Mello is only one person. She has no client.

9. That though Ms. Mello may act pro se in this appeal by representing herself, such self-representation is not recognized by the State of Missouri as the practice of law. That in this appeal, this Court has no legal authority to recognize Mello as an officer of its Court. See IN RE HEARD 106 B.R. 481 (Bkrtcy.N.D. Ohio 1989) where the judge went to extreme length to show authorization for sanctioning a pro se attorney as an attorney (he found it under "aura").

10. That this Court would be in violation, per se, of

its duty to remain impartial, if, in this case, it were to recognize Mello as an officer of its court.

11. That Ms. Mello's entry of appearance as counsel for herself was made in bad faith. That Mello, by knowledge gained through her practice of law outside of this case, is held to have known that her capacity as a party forbids this Court from also recognizing her in the capacity of an officer of the court, as said capacities are mutually exclusive, and, that her attempt to subom this Court's partiality in her favor, is unlawful per se.

12. That Mr. Harper and Ms. Speiser, as officers of this Court, had a primary duty to uphold justice. That at any and all times in this case, Ms. Mello was Harper's and Speiser's client. That Harper and Speiser are held strictly liable for any wrongful actions of their client that they knowingly endorse or condone. That Harper and Speiser are held to have known of Mello's entry of appearance, that it was filed in bad faith, and that it was unlawful, per se.

13. That Missouri rules of professional ethics prohibit an attorney from representing a client who knowingly pursues an unlawful end.

14. That the importance of a motion to disqualify and its potential, if denied, of continuing an injustice to the movant, is such that it is immediately appealable. That in this appeal, disqualification of counsel is appropriate to prevent an injustice to the appellant

15. That appellant apologizes for both the lack of citations, and that the two cited are not directly on point. Perhaps no attorneys have ever before attempted to stand as both party and officer of the court. On the other hand, perhaps they have, but that "professional courtesy" prevented the opposing party from calling their bluff.

THEREFORE, appellant William H. Viehweg moves that this Court disqualify Susan H. Mello from acting as an officer-of-the-court in this case, disqualify Scott C. Harper, Susan M. Speiser and the law firm of Brinker and Doyen from representing Ms. Mello in this case, and enter an order,

relevant to this appeal 1) prohibiting Mello from seeking status in this case as an officer-of-the-court; 2) prohibiting Mello from signing her name or referring to herself as anything other than her proper party status "appellee" or "defendant" (prohibited terms include "counsel for", "co-counsel for", "attorney for", and "co-attorney for"); and 3) warning Mello that a violation of this protective order warrants striking Mello's improperly signed document from the file, and/or to terminating Mello's time for oral argument.

AND LASTLY, for whatever other relief this Court deems just.

Respectfully submitted,

William H. Viehweg (signature)
William H. Viehweg
114 West 2nd South
Mt. Olive, IL 62069
1-217-999-5061

In The United States Court of Appeals
Eighth Circuit

William H. Viehweg,
Appellant,

vs. Appeal No. 98-2732EMSL

Susan H. Mello,
Appellee.

Defendant's Memorandum in Response to Plaintiff's Motion to Disqualify and Motion for Protective Order

COMES NOW Defendant, Susan H. Mello, by and through counsel, and in support of her Response to Plaintiff's Motion to Disqualify Defendant's Attorneys, Harper and Speiser, and the law firm of Brinker & Doyen, L.L.P., states to this Court as follows:

1. The present appeal is before this Court following an order by the United States District Court for the Eastern District granting Appellee's Motion for Summary Judgment.

2. On August 18, 1998, Appellant Viehweg filed a Motion to Disqualify Appellee Mello and Appellee's counsel from further representation in the present case as well as a Motion for Protective Order.

3. Appellant appears to argue that Appellee Mello must be disqualified from representing herself in this matter because an attorney may not represent herself as counsel in a cause of action to which she is a party. Then, Appellee {sic} asserts that Appellant {sic} Mello may represent herself, but not as an attorney. Finally, Appellant appears to argue that Appellee's counsel, Scott C. Harper and Karen M. Speiser, must also be disqualified because they had knowledge that Appellee could not be recognized as co-

counsel in a case where she was a party. Appellant's Motion accuses co-counsel Harper and Speiser of unethical conduct because they should have known that Appellee's self-representation was unlawful.

4. Appellant fails to direct this court to any statute or court rule stating that Appellee Mello may not enter her appearance as counsel on her own behalf. Appellee is unaware of any such statute or rule preventing a party from acting as her own counsel if she is a licensed attorney.

5. As Appellant admits in his Motion, the two cases he cites as support for disqualification of Ms. Mello do not even address disqualifying an attorney representing herself in a case where she is a party. In fact, in the case of *In re Leon S. Heard*, 106 B.R. 481 (Bkrtcy.N.B.Ohio 1989), which Appellant cites as support for his Motion, the court states that, "Even when an attorney represents [herself] in a *pro se* capacity, [s]he does not lose the aura of an officer of the court." By making this statement, the court not only recognizes an attorney's ability to represent herself in a case where she is a party, but also recognizes that an attorney still acts as an officer of the court even when engaging in self-representation.

6. Thus, it is not possible for Appellant [sic} Mello to represent herself without being recognized as an attorney and officer of the court. Appellee's {sic}argument that Appellant {sic}can represent herself as a *pro se* but not as an attorney is confusing and without merit or legal support.

7. Appellant also cites *Hutchinson v. Gertsch*, 159 Cal.Rptr. 40,49 (Cal.App.2d 1979), as support for Appellant {sic} Mello's disqualification. *Hutchinson* is a state court appellate opinion of no precedential value to this court. In addition, the court's opinion in that case does not even address the issue of attorney disqualification. Furthermore, the *Hutchinson* opinion recoginizes that an attorney may represent herself in a case where she is a named party.

8. Motions to disqualify should be reviewed with extreme caution for they can be misused as techniques of harassment. *Professional Service Industries, Inc. v. Kinbrell*,

758 F.Supp. 676, 680 (D.Kanses 1991). The right to be represented by counsel of choice is an important one, subject to override only upon a showing of compelling circumstances. *Id.* at 680. In addition, disqualification is not favored because it usually presents high costs to the litigants and the court system and temporarily disables the litigant in his effort to mount a defense. *Rizzo V. Sears, Roebuck and Co.*, 127 F.R.D. 423, 424 (D.Mass. 1989).

9. Appellant's Motion to Disqualify fails to set forth any compelling circumstances for disqualification of Appellee Mello or her counsel, Harper and Speiser. Appellant argues that continued involvement by Appellee Mello in her own defense represents an "injustice" to him before this court. Appellant does not specify what, if any, "injustice" is presented by Appellee's involvement in her own defense.

10. Furthermore, Appellant's suggestion that this Court cannot make an impartial decision when a licensed attorney is involved in a case as a party is groundless and lacks any legal support.

11. Appellant's Motion is without merit and represents a misuse of the legal system as it was filed to harass and annoy Ms. Mello and her counsel. Appellee Mello requests sanctions from this Court and requests the court issue an order preventing Appellant from filing any further frivolous motions during the pendency of this case.

12. WHEREFORE, Appellee Susan H. Mello respectfully requests this court deny Appellant's Motion to Disqualify and Motion for Protective Order. Appellee further requests this court to issue sanctions against Appellant for filing a frivolous motion before this Court. Appellant [sic}requests any and all other relief which this court deems just and proper.

Respectfully Submitted:

Brinker & Doyen, L.L.P.

Karen M. Speiser (signature)
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Karen M. Speiser #79808
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Counsel for Defendant

FILED
OCT 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 98-467

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

*In re WILLIAM H. VIEHWEG*

On Petition for Extraordinary Writ
to United States Court of Appeals for the Eighth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR EXTRAORDINARY WRIT

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# No. 98-467

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1998

IN RE: WILLIAM H. VIEHWEG

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR EXTRAORDINARY WRIT

## I. ARGUMENT

COMES NOW Respondent and pursuant to Rule 20(3)(b) and opposes the Petitioner's Petition for Extraordinary Writ:

First, the Petition fails to comply with Rule 20 and should be dismissed. Petitioner's Petition fails to make any statement as to any "exceptional circumstances" warranting this Honorable Court's exercise of jurisdiction as required by Rule 20(1). The Petition does not include any statement that adequate relief is not available from the Court below, the Eighth Circuit Court of Appeals. See Rule 20(1). The Petition does not include the judgment for which the Writ is sought. See Rule 20(3).

Second, the Petition is unwarranted, does not merit any relief, and would not have any bearing or effect on the pending appeal which concerns a grant of summary judgment on Petitioner's

complaint that Respondent would not represent him.[1] While Respondent did enter her appearance as co-counsel with other defense counsel, it has not had and cannot have any bearing on Petitioner or the appeal. Respondent has not sought to be treated independently, and would be filing only one brief.

Third, Petitioner's argument that Respondent may not act as her own counsel is entirely without merit. The law is clear that just as Petitioner is entitled to represent himself pro se that there is nothing improper for a party/attorney to represent himself or herself in litigation.

## II. CONCLUSION

In short, it is respectfully submitted there is no issue which merits this Court's attention. The Court should not issue any extraordinary writ.

Respectfully submitted:
/s/Gary P. Paul
GARY P. PAUL
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(314) 863-6311
(314) 863-8197 (Fax)
SUSAN H. MELLO
**Attorneys for Respondent**

## CERTIFICATE OF SERVICE

Three copies of the foregoing instrument was served on William H. Viehweg, 114 West 2nd South, Mount Olive, Illinois 62069, by placing same in the U.S. Mail, postage prepaid, on the _____ day of _____,1998.

---

[1]Contrary to Appellant's, impression, Respondent has never been associated with the U.S. Department of Justice and has at all times, been a private attorney.

# APPENDIX

**APPENDIX**

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

---

## NO. 4:97CV00211 TCM

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WILLIAM H. VIEHWEG,
*Plaintiff,*

v.

SUSAN H. MELLO,
*Defendant.*

FILED: May 26, 1998

### MEMORANDUM AND ORDER

This diversity case is before the Court on several dispositive motions and on various miscellaneous motions filed by the parties. The dispositive motions include defendant Susan Mello's two motions for summary judgment [Docs. 71, 105] and her two motions to dismiss [Docs. 86, 89]. The miscellaneous motions include, but are not limited to, two motions to strike [Docs. 89, 91], a "motion for order of revision of the March 30, 1998, order," [Doc. 109], and plaintiff William Viehweg's motion for leave to file a second amended complaint [Doc. 100].

### Background

The following facts are generally applicable to the pending motions. Additional facts applicable to specific motions will be outlined as necessary.

William Viehweg ("Plaintiff") was hired by Inprint Systems, Inc. ("ISI") in January 1987 and fired in February 1990. (Def.'s Mtn. to Dismiss Ex. [A] at ¶ 1(D)[1] and Mtn. Ex. "K" at [68].[2]) On October 3, 1991, he consulted Susan Mello ("Defendant"), an attorney licensed to practice in Missouri and with offices in Clayton, about possible causes of action against ISI and two of its employees, David Barry and John Dultz. (Am. Compl. at ¶¶ 2 and 3.) That same day, he signed a fee agreement providing, in relevant part, that he "acknowledges that no representations concerning the successful termination of the claims, or the favorable outcome of any legal action which *may* be filed has been made." (Pl.'s Aff. at ¶ 8; Def.'s Answer Ex. "A" (emphasis added).) Pursuant to that agreement, Plaintiff paid Defendant $500.00 as a "non-refundable" retainer and also agreed to pay her an hourly rate of $90.00. (*Id.*) Plaintiff wrote Defendant two days later, explaining what causes of action he thought he had against ISI and the two employees. (Def.'s Answer Ex. "B".)

Defendant wrote ISI on November 6, advising the company that, based on information she allegedly had received from Plaintiff, Plaintiff apparently had a cause of action against ISI for breach of contract and violation of its duties under the Employment Retirement Income Security Act ("ERISA") and that it was her policy to contact potential parties in advance of litigation to attempt to resolve the underlying disputes. (Def.'s Answer Ex. "B".)

An attorney representing ISI wrote Defendant on November 11 requesting additional time within which to investigate and respond to Plaintiff's claims. (Def's Mtn. Ex. "D"; Pl.'s Aff. at ¶ 9.)

---

[1]References to "Def.'s Mtn. to Dismiss Ex. [A]" are to Plaintiff's answers to Defendant's interrogatories.

[2]References to "Def.'s Mtn. Ex." are to exhibits attached to Defendant's November 1997 motion for summary judgment.

The next correspondence regarding Plaintiff's claims against ISI was a card from Plaintiff to Defendant dated January 13, 1992, inquiring about the status of his claims, requesting advice about his options, and expressing his concern that "[t]he two year statute of limitation [was] approach[ing]." (Def's Mtn. Ex. "E".) On January 16, Defendant wrote Plaintiff, apologizing for any delay, forwarding him copies of correspondence she had recently received from ISI's attorney and her response, and enclosing a client information form she requested that he complete and return. (Def.'s Mtn. Ex. "F".) The January 14 letter from ISI's attorney read, in part, that:

> [Plaintiff] was not terminated for making any claim for an injury in the workplace. [Plaintiff] had a propensity to leave work without an excuse and without informing his supervisor of his desire or need to leave work. After several discussions concerning this behavior, [Plaintiff] was terminated for leaving the workplace without authorization. (Def.'s Mtn. Ex. "G".)

Defendant promptly replied to the letter, and, in her written reply, advised opposing counsel that she was assuming that he was acknowledging the validity of several claims or allegations that he did not address in his letter. (Def.'s Mtn. Ex. "H".) Opposing counsel responded by letter dated January 24, taking issue with Defendant's assumptions. (Def.'s Mtn. Ex. "I".) Defendant replied to the response; opposing counsel responded to that reply; Defendant wrote an addendum on opposing counsel's response and forwarded same to counsel. (Def.'s Mtn. Et "J".)

On February 10, Plaintiff delivered the information he had compiled at Defendant's request to Defendant's office. (Pl.'s Aff. at ¶ 11.) Included in that information was a list of various lawsuits that he had prosecuted pro se. (Def's Mtn. Ex. "K" at [12]-[14].) Two of those lawsuits named attorneys as defendants. (*Id.*) Three days later, Defendant wrote Plaintiff terminat-

ing her representation. (Def's Mtn. Ex. "L".) She delineated in that letter the problems she anticipated with any lawsuit against ISI arising out of Plaintiff's employment, advised him that another attorney might assess the case differently, and enclosed a list of attorneys who generally represent plaintiffs. (*Id.*)

On June 30, 1992, Plaintiff filed suit pro se against ISI, its owner, and another employee. (*Viehweg v. Dultz*, No. 4:92CV1243 CAS (E.D.Mo.)) The two individuals were sued for tortious interference of business relationship, the company was sued for violating Missouri's service letter statute and also sued under a theory of prima facie tort for discharging Plaintiff. Plaintiff explained his motive for filing the suit as a desire to establish a legal precedent that an employee's work history is a legally protectable asset. (Pl.'s Aff. at ¶ 7.) Plaintiff vigorously prosecuted his action pro se until two attorneys, Lloyd Vasquez and Grace Fuentes, entered their appearance on his behalf in May 1994 and February 1995, respectively. Plaintiff paid his lawyers an initial retainer of $11,500.00, agreed to pay an hourly rate of $120.00, and paid a second retainer of $10,000.00 in January 1995. (Def.'s Mtn. to Dismiss Ex. [A] at ¶¶ 3(C)(i)-(iii).) In his answers to interrogatories, Plaintiff listed only Defendant, Vasquez, and Fuentes as lawyers he contacted about his claims against ISI and the two individuals. (*Id.* at ¶ 3(F).)

In June 1995, Plaintiff dismissed his suit. (*Viehweg v. Dultz*, supra.) He states in his answers to interrogatories that he settled the case for $60,000.00. (Def.'s Mtn. to Dismiss Ex [A] at ¶ 3(E).) When asked what he contended Defendant would have done to obtain a higher settlement, Plaintiff replied, "I have not contended that [Defendant] would have done anything differently than [] Vasquez and Fuentes did." (*Id.*)

Plaintiff does contend, however, that "[Defendant's] misrepresentations to [ISI's] lawyer about any five year agreement and about how I hurt my back, that [Defendant's] vitriolic correspon-

dence with [ISI's] lawyer, that [Defendant's] abandonment of me and my subsequent pro se handling of the case [] damaged my ability to obtain a higher settlement and that damage is the nominal sum of $1.00." (Pl.'s Aff. at ¶¶ 18.) Plaintiff alleges in his amended complaint that he "incurred medically diagnosable and medically significant, emotional and mental pain and suffering," as a result of Defendant's actions. (Am. Compl. at ¶ 22.) In his answers to interrogatories, however, Plaintiff states that he has "never been treated for emotional distress, [has] never undergone psychological testing, though I have had twelve general counseling sessions, not directly related to any claim in this action." (Def.'s Mtn. to Dismiss Ex. [A] at ¶ 3(B).)

While Plaintiff's suit against ISI and the two individuals was pending, Defendant wrote Plaintiff on May 24, 1994, returning the written material he had given her, calculating the hours she had spent representing him, and refunding to him $40.00 of her retainer fee. (Def's Mtn. Ex. "M".)

## Discussion

Motion for Leave to File Second Amended Complaint. Plaintiff requests leave to file a second amended complaint which he describes as adding neither parties nor claims. (Mtn. at ¶ 2.) The second amended complaint does include additional allegations of actions taken or not taken by Defendant during her three-month representation of Plaintiff, actions of which he clearly was aware when filing this action. This request is made one year after the seminal complaint was filed, eight months after the deadline established by the Court's case management order for amendment of pleadings, and three months after Defendant filed her motion for summary judgment.

"[I]t is well settled that leave to amend should 'be freely given when justice so requires.'" *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994) (quoting Fed.R.Civ.P.

15(a)). Thus, leave shall be granted absent a good reason for denial, e.g., undue delay, bad faith or dilatory motive, repeated failure to cure the deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment. See *Foman v. Davis,* 371 U.S. 178, 182 (1962).

The Court finds three good reasons for denying Plaintiff leave to file his second amended complaint. First, as Plaintiff reveals, the second amended complaint adds neither new parties nor new claims. Thus, denial of leave to amend would not cause him to forfeit any claim. Second, there would be undue prejudice to Defendant, who has moved twice for summary judgment and twice to dismiss. See *Moore v. Jackson,* 123 F.3d 1082, 1089 (8th Cir. 1997) (affirming denial of leave to amend complaint after opposing party had moved for summary judgment); *Williams,* 21 F.3d at 224-25 (affirming denial of leave to amend complaint fourteen months after first complaint was filed, six days after discovery deadline, and less than three weeks before trial); *Perkins v. Spivey,* 911 F.2d 22, 34-35 (8th Cir.1990) (affirming denial of leave to amend complaint eighteen months after first complaint filed); *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989) (denying leave to amend complaint to add four new defendants in case which had been pending for 18 months, discovery had been completed for six weeks, summary judgment motions were due two weeks before, and trial was to begin in two weeks). Third, for the reasons set forth below, the amendments would be futile. See *Wald v. Southwestern Bell Corp. Customcare Medical Plan*, 83 F.3d 1002, 1005 (8th Cir. 1996) (district court did not abuse its discretion in denying party leave to amend complaint to add count which would not have stated cause of action), *Fuller v. Secretary of Defense of U.S.*, 30 F.3d 86, 88-89 (8th Cir. 1994 (denial of leave to amend complaint to add claim which required exhaustion of administrative remedies was not abuse of discretion).

Motion for Order of Revision. By order of March 30, 1998, the Court granted Defendant's motion to dismiss Count III of the First Amended Complaint on the grounds that the count was based on the same actions as gave rise to Count I but was simply rephrased as a separate claim. Plaintiff requests that the Court reconsider that order, stating that Count I alleged that Defendant violated a duty owed him when not litigating his claims against David Barry, owner of ISI, and Count III alleged that Defendant violated a duty owed him when not litigating his claim against John Dultz. Plaintiff further states that his reference to Barry in Count III was a typographical error and that the other references to John Dultz were accurate. Defendant opposes the motion, arguing, inter alia, that such motions for reconsideration are not permissible.

This Court has the inherent power to reconsider and modify an interlocutory order any time prior to entry of judgment. See *Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995); *Lovett v. General Motors Corp.*, 975 F.2d 518, 522 (8th Cir. 1992). Thus, the Court may depart from an earlier holding if it is convinced that the holding is incorrect. See *Id.*

The Court's earlier ruling dismissing Count III was premised on the apparently mistaken reading that it was against Barry. The Court notes that John Dultz is named as the defendant in other paragraphs in the count. Accordingly, the Court will grant Plaintiff's motion, set aside its earlier order, and deny the motion to dismiss as to Count III.

Motions for Summary Judgment. Defendant moves for summary judgment on the grounds that (i) Plaintiff can not establish any causation between her actions and any damages incurred by him; (ii) she has no duty to represent a client when that representation could result in a violation of court rules; and (iii) she never assumed the duty of representing Plaintiff in litigation against

ISI and its employees. Plaintiff counters, in part, that Defendant withdrew from representing him because of her personal repugnance to his previous litigation against lawyers and that she improperly abandoned him when she knew, or should have known, that Plaintiff would encounter hardships and prejudice if he had to proceed against ISI pro se.

In a supplement to her motion for summary judgment, Defendant further argues that she decided when first speaking with Plaintiff in October 1991 not to represent him in his suit against the two employees and that Plaintiff should have known this at least by November 1991 and, consequently, his two claims relating to those two employees are barred by the five year statute of limitations for legal malpractice actions.

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of material fact is genuine if it has a real basis in the record; and, a genuine issue of fact is material if it "might affect the outcome of the suit under the governing law." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citations omitted).

The initial burden is on the moving party to clearly establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. See *City of Mt Pleasant, Iowa v. Associated Elec. Co-op., Inc.*,, 838 F.2d 268, 273 (8th Cir. 1988). After the moving party discharges this burden, the non-moving party must do more than show that there is some doubt as to the facts. & *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the non-moving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249

(1986). All disputed facts are to be resolved, and all inferences are to be drawn, in favor of the non-moving party. See *Kopp v. Samaritan Health Sys., Inc.,* 13 F.3d 264, 269 (8th Cir. 1993).

Conclusive assertions of ultimate fact are entitled to little weight, however, when determining whether a nonmovant has shown a genuine issue of fact sufficient to overcome a summary judgment motion properly supported by depositions or affidavits. See *Miller vs. Solem,* 728 F.2d 1020, 1024 (8th Cir. 1984). Moreover, where the unresolved issues are primarily legal, rather than factual, summary judgment is particularly appropriate. See *Crain v. Board of Police Comm'rs,* 920 F.2d 1402, 1405-06 (8th Cir. 1990).

Plaintiff alleges in Count I that Defendant breached a fiduciary duty owed him when terminating their attorney-client relationship prior to the conclusion of his claims against David Barry; in Count II that Defendant breached the same duty in the same way prior to the conclusion of his claims against ISI; and in Count III that Defendant breached the same duty in the same way prior to the conclusion of his claims against John Dultz.

A claim of legal malpractice has four elements: (1) an attorney-client relationship; (2) negligence or breach of contract by the attorney; (3) proximate causation of plaintiff's damages; and (4) damages to the plaintiff. See *Klemme v. Best,* 941 S.W.2d 493, 495 (Mo. 1997) (en banc); *Huber v. Magna Bank of Missouri,* 959 S.W.2d 812, 814 (Mo.Ct.App. 1997); *McDowell v. Waldron,* 920 S.W.2d 555,559 (Mo.Ct.App. 1996). A claim of breach of fiduciary duty, or constructive fraud, has five elements: (1) an attorney-client relationship; (2) breach of a fiduciary obligation by the attorney; (3) proximate causation; (4) damages to the plaintiff; and (5) no other recognized tort encompasses the facts alleged. See *Klemme,* 941 S.W.2d at 496. The second and fifth elements distinguish a claim of breach of fiduciary duty from a claim of legal malpractice. See *Id.* If the

complained-of actions by the attorney can be characterized as both negligence and a breach of a fiduciary obligation, then the sole claim is legal malpractice. See *Id.*

Plaintiff complains that Defendant breached an obligation owed him by terminating her representation of him, knowing that he would be unable to persuade another attorney to take his claims, and thereby forcing him to litigate his claims himself, although he was not competent to do so. Regardless whether Plaintiff's complaint is characterized as one of legal malpractice or a breach of fiduciary duty, he has failed to establish that Defendant breached a duty to him, that her action was the proximate cause of any damages he incurred, or that he sustained any damages.

Plaintiff alleges that Defendant terminated their attorney-client relationship because she was repulsed by his lawsuits against lawyers; Defendant counters that she terminated the relationship because of ethical considerations. Under either explanation, Defendant had no unperformed duty to Plaintiff. "[A]n attorney may properly withdraw from representation when he or she determines that the matter should not be brought to suit. Indeed, such a principle is manifest from such mechanisms as Fed.R.Civ.P. 11, which actually punish an attorney from pursuing a suit that is not properly maintainable under the governing substantive law." *Riordan v. Jones,* 793 F. Supp. 650, 651 (D. Md. 1992). And, under Rule 4(b)(3) of the Missouri Supreme Court Rules, when no proceedings are pending before a tribunal, a lawyer may withdraw from representing a client when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." *See also* American Bar Association Model Rules of Professional Conduct 1.2 Comment [1] ("[A] lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.")

In addition to failing to establish a breach of duty, Plaintiff has also failed to establish that Defendant's termination of their

attorney-client relationship was the cause of any damages incurred by him.

The attorney-client relationship between Plaintiff and Defendant began in October 1991 and ended in February 1992. Plaintiff makes several references in the pleadings to a statute of limitations which would run out on his claims in June 1992 — two and one-half years after his termination from ISI. Missouri, however, provides for a five year statute of limitations for actions "for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another . . .", Mo. Rev. Stat. § 516.120(4), and for "actions for relief on the ground of fraud. . .", *id.* at § 516.120(5). See *Ryder v. Ward,* 933 S.W.2d 428, 430 (Mo.Ct.App. 1996) ("statute of limitations for tort claims is five years"). Thus, regardless whether Plaintiff characterizes his action against ISI, Barry, and Dultz as one for tortious interference with business relationship,[3] fraud, or for the injury to his work history, the action was governed by the five year statute of limitations. Even if the Court were to accept, however, Plaintiff's allegation that a two and one-half year limitation period governed his claim, he had, at the minimum, six months within which to retain new counsel.

In *Faulkner v. Ensz,* 109 F.3d 474 (8th Cir. 1997), a former client sued an attorney she had consulted about filing a possible Title VII sex discrimination claim. The attorney had turned his file on the plaintiff's case over to another attorney, with plaintiff's knowledge, a month before the deadline for filing an administra-

[3]The prima facie elements in Missouri of a claim of tortious interference with business relationship are: existence of a valid business relationship; knowledge of the relationship or expectancy on the part of the defendant; an intentional interference with inducing or causing a breach or termination of the relationship or expectancy; the absence of justification; and resultant damages to the party whose relationship or expectancy had been disrupted. See *Williams v. Blumer,* 763 S.W.2d 242, 246 (Mo.Ct.App. 1988).

tive charge. *Id.* at 476. The other attorney contacted the plaintiff after the deadline had passed and told her that she (the attorney) was not interested in pursuing the case because of the statute of limitations problem. *Id.* The Eighth Circuit Court of Appeals found that the sued attorney's involvement ended in May 1991 when he gave the file to another attorney and concluded that the plaintiff's suit failed on the causation element, noting that "[u]nder Missouri law, a successful attorney malpractice claim requires a causal connection between the attorney's negligence and the plaintiff's damages." *Id.* "'To prove damages and causation, the plaintiff must establish that 'but for' the attorney's negligence the result of the underlying proceeding would have been different.'" 151 (quoting *London v. Weitzman,* 884 S.W.2d 674, 677 (Mo.Ct.App. 1994)). "'But for' is an absolute minimum for causation because it is merely causation in fact.... [T]here [must] be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.'" *Id.* (quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993) (en banc)) (alterations in original). See also *Rodgers v. Czamanske,* 862 S.W.2d 453, 457 (Mo.Ct.App.1993) (plaintiff in legal malpractice case must prove that, but for attorney's complained-of actions, result of underlying proceeding would have been different).

In *Riordan,* supra, the father of a child injured in a bicycle accident sued three attorneys he had consulted about filing a product liability against the manufacturer. The attorneys had each concluded that the suit would be without merit, and withdrew from representing the father. The father sued the attorneys for malpractice, alleging that the child suffered redressable injury as a result of their withdrawal. The district court granted the attorneys summary judgment, noting that "it has been consistently held that where, as here, there is sufficient time to engage new counsel and file suit, there is no malpractice." *Riordan.* 793 F. Supp. at 651. See also *Steketee v. Lintz, Williams & Rothberg,* 38 Cal.3d 46, 694 P.2d 1153, 210 Cal.Rptr. 781 (1985) (en banc)

("[a]n attorney cannot be held liable for failing to file an action prior to the expiration of the statute of limitations if he ceased to represent the client and was replaced by other counsel before the statute ran on the client's action").

In the instant case, Defendant was not immediately replaced by other counsel. The Court finds that this fact is not material. As noted above, Plaintiff had time within which to secure other counsel; however, Plaintiff has stated that he did not attempt to do so. See *Medrano v. Reyes,* 902 S.W.2d 176, 178 (Tex.Ct.App. 1995) (affirming grant of summary judgment to law firm who had withdrawn from representation 21 months before running of statute of limitations and holding that firm should not be held liable for failing to file an action on behalf of plaintiffs before the expiration of statute of limitations where there was sufficient time for the employment of other counsel before expiration period); *Harvey v. Mackay,* 109 Ill.App.3d 582, 587, 65 Ill.Dec. 167, 440 N.E.2d 1022 (1982) (attorney's failure to file lawsuit prior to expiration of statute of limitations not malpractice where attorney withdrew from representation one year before expiration period). Moreover, Plaintiff has not alleged, nor is there any indication in the record to support such an allegation, that Defendant interfered or otherwise obstructed Plaintiff in any effort to secure counsel. Additionally, Plaintiffs action was not barred by the statute of limitations. He filed the suit pro se in June 1992 and settled it, represented by counsel, in June 1995. He stated in his answers to interrogatories that there is nothing that Defendant would have done that would have secured him a higher settlement. Thus, Plaintiff was adequately represented by two other attorneys in the litigation about which he initially consulted Defendant and was satisfied with their representation and the results. Plaintiff, therefore, can not establish any causal connection between any fault he may now find with the underlying litigation and Defendant's complained-of actions. See *Cain v. Hershewe,* 760 S.W.2d 146, 150 (Mo.Ct.App.1988). See

also *Cain v. Webster*, 770 S.W.2d 327, 330-31 (Mo.Ct.App. 1989) (per curiam) (plaintiff failed to establish submissible case of legal malpractice when he failed to establish what defendant did or omitted which caused his damages).

Moreover, even if Plaintiff were not satisfied with the results obtained by his new attorneys, his decision not to contact any attorneys until he contacted Fuentes and Vasquez and their subsequent control of the underlying litigation are intervening causes. "An intervening cause is a new and independent force which interrupts the chain of events initiated by the defendant's negligence in such a significant manner as to become the direct and proximate cause of the plaintiff's damages." *Rodgers v. Czamanske*, 862 S.W.2d 453, 458 (Mo.Ct.App. 1993). Actions taken by subsequent attorneys affecting the disposition of the litigation may be an intervening cause. See *Id.* (dismissal of counterclaim by attorney who represented plaintiff after defendant was intervening cause). See also *Faulkner*, 109 F.3d at 476-77 (new attorney's assumption of case was intervening cause). Similarly, Plaintiff's failure to seek other counsel to prosecute his suit against ISI, therefore rendering it necessary that he file the suit pro se, is an intervening cause of his initially prosecuting that suit pro se.

In order to prevail on his claims against Defendant, Plaintiff must establish that there were damages proximately resulting from her actions, and the measure of those is the amount he would have received "but for" Defendant's negligence. See *Steward v. Goetz*, 945 S.W.2d 520, 532 (Mo.Ct.App. 1997). "'[D]amages are speculative . . . if the uncertainty concerns the fact of whether there are any damages rather than the amount.'" *London*, 884 S.W.2d at 677 (quoting R.E. Mallen and J.M. Smith, *Legal Malpractice*, Vol. 1, § 16.3 (3rd ed. 1989)).

Plaintiff has failed to establish that he incurred any damages as a result of Defendant's actions — he is satisfied with the

results in the underlying litigation and does not contend that Defendant could have achieved more satisfactory results. See *Lange v. Marshall,* 622 S.W.2d 237, 239 (Mo.Ct.App. 1981) (reversing award of damages to plaintiff in legal malpractice case in which she had failed to establish that had defendant done the things she contended he should have done that she would not have incurred incidental fees and expenses that she claimed as damages).

Additionally, the Court notes that Plaintiff does not have expert testimony to support his claims. "'[E]xcept in clear and palpable causes (such as the expiration of a statute of limitation), expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice.'" *Cooper v. Simon,* 719 S.W.2d 463, 464 465 (Mo.Ct.App.1986) (quoting *Hughes v. Malone,* 146 Ga.App.341, 247 S.E.2d 107, 111 (1978)). See also *Bross v. Denny,* 791 S.W.2d 416, 421 (Mo.Ct.App. 1990) (holding to same effect). In other words, expert testimony is necessary if the type of negligence alleged is not so clear that it could be assessed without the aid of expert testimony and, consequently, a jury would have to resort to pure speculation in order to find negligence on the part of an attorney. See *Cooper,* 719 S.W.2d at 465.

The negligence or breach of duty alleged by Plaintiff is not so clear and palpable that it can be assessed without the aid of expert testimony. Moreover, the Court rejects as meritless Plaintiff's contention that he is competent to give expert testimony in his legal malpractice case because he, as a pro se litigant, is expected to follow the civil rules of procedure and the local rules.

For the foregoing reasons, the Court will grant Defendant's motion for summary judgment on each of the three pending counts. The Court will, therefore, not reach the merits of Defendant's supplemental motion for summary judgment or the two motions to dismiss.

Motion to Seal. Defendant requests that this Court order the transcript of her deposition and the videotape of that deposition sealed, citing, inter alia, confidential matters disclosed during that deposition. The Court will grant this motion and direct the Clerk's Office to seal the transcript and videotape deposition, including the copy of the transcript attached as an exhibit to Plaintiff's response to Defendant's motion for summary judgment, docket number 95.

All other pending motions will be denied as moot.

## Conclusion

Defendant's request for summary judgment on each of the three counts of Plaintiff's complaint is meritorous based on Plaintiff's failure to refute her showing that there is no genuine issue of material fact as to the elements of a claim of legal malpractice or a claim of breach of fiduciary duty.

Accordingly,

IT IS HEREBY ORDERED that plaintiff William H. Viehweg's Motion for Order of Revision of March 30, 1998, Order is GRANTED. [Doc.109]

IT IS FURTHER ORDERED that plaintiff William H. Viehweg's Motion for Leave to File Second Amended Complaint is DENIED. [Doc.100]

IT IS FURTHER ORDERED that defendant Susan H. Mello's Motion for Summary Judgment is GRANTED. [Doc.71]

IT IS FURTHER ORDERED that defendant Susan H. Mello's motion to seal the transcript and videotape of her deposition is GRANTED. [Doc.90.] The Clerk's Office is hereby directed to seal the transcript of her deposition docketed as number 94 and

the copy of that transcript attached as an exhibit to Plaintiff's pleading docketed as number 95.

IT IS FURTHER ORDERED that all remaining pending motions are DENIED as moot.

IT IS FINALLY ORDERED that separate judgment shall be entered in favor of Defendant and against Plaintiff in the instant cause of action.

/s/Thomas C. Mummert, III
THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 26th day of May, 1998.

(3)

No. 98-467

FILED
OCT 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1998

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*In re* WILLIAM H. VIEHWEG

On Petition for an Extraordinary Writ
to United States Court of Appeals for the Eighth Circuit

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## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT

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## ARGUMENT

**COMES NOW** Petitioner, pursuant to Rule 15(6), and replies to the Respondent's brief in opposition.

**Dismissal.** Contrary to Respondent's argument, Supreme Court Rule 20(1) does not require precise statements. It does require a showing sufficient to satisfy certain requirements. Therefore, as no explicit language is required, when the entire petition is evaluated and given reasonable inference, it does meets the requirements.

Contrary to Respondent's argument, the Petition does show that adequate relief is not available from the court below. The Petition, in the last several paragraphs of its Statement of the Case, states that the Petitioner properly sought appropriate relief from the Eight Circuit Court of Appeals, by moving to disqualify the Respondent from

entering her appearance as counsel for herself, but was summarily denied. Petitioner even sought reconsideration, only to be summarily denied again. If the Respondent intends to argue that other relief is available, she should have specified what available relief the Petitioner failed to seek.

Contrary to Respondent's argument, the Petition does contain a copy of the order with respect to which the writ is sought. The Petition requests that this Court review the Eight Circuit Court's refusal to disqualify Respondent, a party in this case, from entering her attorney appearance as counsel for herself. The Eight Circuit's orders denying Petitioner's motion to disqualify Respondent are included in the Petition's Appendix on pages 2 and 3. The Respondent's copy of the trial Court's final judgment, as included in her brief's appendix, is irrelevant.

**Court has duty.** This Court has a duty to supervise and ensure the impartial administration of justice within its system. A claim of fraud, perpetuated by the court's own officers, cannot be summarily dismissed.

**Conflict between State and Federal law.** As argued by the Petitioner, and undenied by the Respondent, the Missouri Supreme Court has clearly ruled that self-representation can not and does not constitute the practice of law. Yet the federal courts, via the Eight Circuit Court of Appeals denial to disqualify Respondent from representing herself as Missouri-licensed legal counsel, have recognized self-representation as the practice of law. Are the federal courts overriding Missouri state law, re-interpreting it, or ignoring it? Is the practice of law, as licensed by the State of Missouri, to be defined by the State of Missouri, to be defined by the federal courts, or to be a mere waif in the wind?

**Crossover line.** The American justice system can be seen as a pyramid. At the apex is the court, or judge. At the corners of the base, equidistant from the court, and each other

are the parties. At slightly higher than midpoint up the appropriate sides, are the attorneys representing the parties. The attorneys are slightly closer to the court, because their first duty is to justice, and only then, to their client.

Respondent, a party, argues that she can climb the pyramid and stand as an attorney, no longer equidistant from the Petitioner, and closer to the court, without prejudicing the Petitioner by destroying the fundamental structure of American justice.

**Violation of common wisdom.** There is an old saying that he who represents himself has a fool for an attorney. Such a saying is based upon the common wisdom that self-representation deprives the party of objective thinking.

Does the legal profession regard self-representation as professional? Ethical? Does the federal legal system regard self-representation as objective?

If, according to the old saying, the respondent chooses to play the part of the fool, are her attorneys approving such foolery? Does the Missouri Bar Association approve such foolery? Does the State of Missouri approve such foolery? Does the federal court system approve such foolery? Does the United States Constitution approve such foolery? And what are the American people to think of the institutions that are perceived as approving such foolery?

**Show me the law.** Petitioner has effectively opened the door and turned on the light to a dark little injustice that has been kept hidden for a long time. Attorney's representing themselves are not engaged in the practice of law and have no standing to enter appearances as legal counsel for themselves in the federal courts. Such an entry of appearance constitutes intentional misrepresentation, or fraud, and its only true purpose can be to seek partiality from the court and to wrongfully prejudice the opposing party.

Like the fable of the emperor with no clothes, Petitioner, alone, has voiced the obvious, that Respondent has no legal standing to enter her attorney appearance. Her absence of

legal argument shows just how naked she is. Now she asks that this Court look the other way, and ignore the obvious. If, as the Respondent argues, the "law is clear" and in her favor, then why has she not provided this Court with any authorities so stating? Why are there no amicus curiae briefs from the Missouri Bar Association, or other bar associations, in her support? Why, like the fable of the naked emperor, are all of Respondent's supposed supporters so silent?

**Silent prayer.** Respondent has effectively entered a silent prayer, that this Court, effectively, look the other way. Consider the evidence. Respondent has now entered her appearance as legal counsel for herself before this Court.

Supreme Court Rule 34(1)(g) prohibits any names on the cover of briefs except the following: attorneys representing parties, or, parties appearing pro se. Rule 34(3) requires that the signature page at the end of the brief conform with rule 34(1)(g).

The cover of Respondent's brief in opposition contains both her legal counsel's name and law address and the Respondents name and law address. Is Respondent represented by counsel, or is she pro se? Or is she entering her appearance as legal counsel for herself? Who is counsel of record? Such a statement is required by Rule 34(1)(g), yet absent on Respondent's brief. Why, on the signature page, is Respondent's name printed above the term "Attorneys for Respondent"?

Perhaps Rule 34 is intended to be ignored. Perhaps, from now on, all parties, even those represented by counsel and working at fast food restaurants, can demand to have their names and work addresses also printed on the brief's cover. Or, can any non-attorney pro se refer to themselves as "counsel for"? Or, are non-attorney pro ses illegally practicing law by representing themselves in federal court without a law license.

**Bad apple.** Consider the following story. A mother goes to the supermarket to buy her child an apple. From a counter

in the produce department she selects what appears to be a delicious apple. At the check-out counter, the mother discovers that the apple she selected contains a worm. When the mother informs the cashier of the quality problem, the cashier is indifferent. When the mother informs the produce clerk, the clerk states that that is the standard quality of that particular apple. When the mother informs the produce manager, the produce manager states that that is the standard quality of all their produce. When the mother informs the store manager, the store manager states that that is the standard quality of all their products in the store.

Consider the following fact. At the trial court level, Respondent, acting as her own attorney, filed five motions to strike. All where denied as frivolous. Respondent, acting as her own attorney, also served upon the Petitioner ten other motions to strike. But the court, assuming they were also frivolous, refused to allow her to even file them. Where was the Respondent's objectivity? If she was acting as a member of the legal profession, where was her professionalism?

Consider the following fact. At the end of the trial court proceeding, Respondent, acting as her own attorney, filed her bill of costs seeking a total of $3900.66. The Petitioner filed an opposition citing numerous case law. The trial court, on October 15, 1998, granted costs for a total of $253.30. That's just seven percent of the Respondent's original request. Where was the Respondent's objectivity? If she was acting as a member of the legal profession, where was her professionalism?

Need the entire legal profession and justice system be contaminated just to protect the foolery of one attorney?

**Agent of justice department.** Respondent argues that she never acted as an agent of the justice department. If so, then what authority did she have to sign the subpoenas? Failure of a subpoena recepient to comply with a subpoena's order is considered contempt of court. How could Respondent issue a court order without being an agent of the court?

**Service.** Supreme Court Rule 29 requires that Respondent serve three copies of her brief in opposition upon the Petitioner and provide proof of service. Said proof of service must be separate from the brief per section (5) and must recite the facts of the service and be signed by a member of the bar of this Court per section (5)(b).

Respondent's Certificate of Service for her Brief in Opposition is in violation of Rule 29. First, it is not separate from the document. Second, it does not contain the facts of the service as no date is entered. Third, it is not signed. If the Court's copy does contain the dates and signature, then Respondent violated said rule by failing to serve the Petitioner with a true copy. A true copy of Respondent's certificate of service, as provided in all three of the Petitioner's copies, is in the appendix, page A-2.

Note, though the Petitioner acknowledges that mailed service was performed by the Respondent upon the Petitioner on October 13, 1998, Petitioner strongly objects to what appears to have been either the Respondent's intent to file her brief without proper proof of service, or her intent to serve inaccurate copies. Such matters are not trivial.

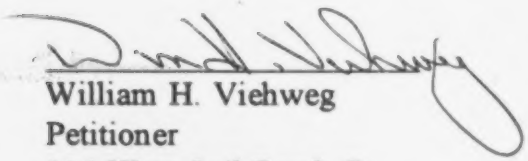
## CONCLUSION

Respondent, a party in this action, has no legal standing to represent herself as legal counsel during the appeal process before the Eight Circuit Court of Appeals. Such a misrepresentation constitutes the illegal practice of law and violates, prima facie, the court's constitutional duty to remain impartial. Petitioner is being wrongfully prejudiced in the appellate court process.

This Court's duty to supervise, not only the administration of the United States Constitution, not only the administration of justice within the federal court system, but also the practice of attorneys appearing before the federal courts, requires that this issue be fully addressed.

The Respondent is illegally practicing law, and she has brought her fraud to the doorstep of this Honorable Court. Such practices must be stopped. Case law prohibiting such practices must be on the books to dissuade future lawyers and judges from overlooking the emperor nakedness. After all, the Petitioner is only a pro se. Without such case law to cite, he does not expect his voice to be heard, no matter how objective, professional, or correct, he may be.

Respectfully submitted,



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Proceedings include all events.
98-2732 William H. Viehweg v. Susan H. Mello

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Counsel Information

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| WILLIAM H. VIEHWEG<br>Plaintiff - Appellant | William H. Viehweg<br>217-999-5061<br>[NTC pro]<br>114 W. Second, S.<br>Mt. Olive, IL 62069 |
| v. | |
| SUSAN H. MELLO<br>Defendant - Appellee | Susan H. Mello<br>314-721-7521<br>Room 403<br>[COR LD NTC ret]<br>7751 Carondelet<br>St. Louis, MO 63105<br><br>Scott C. Harper<br>FTS 863-8197<br>314-863-6311<br>[COR LD NTC ret]<br>BRINKER & DOYEN<br>120 S. Central Avenue<br>Suite 700<br>St. Louis, MO 63105<br>314-863-6311 |



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7/16/98 APPEARANCE for appellee, attorney Susan H. Mello [98-2732] [1023009] (lmt)



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complaint that Respondent would not represent him.[1] While Respondent did enter her appearance as co-counsel with other defense counsel, it has not had and cannot have any bearing on Petitioner or the appeal. Respondent has not sought to be treated independently, and would be filing only one brief.

Third, Petitioner's argument that Respondent may not act as her own counsel is entirely without merit. The law is clear that just as Petitioner is entitled to represent himself pro se that there is nothing improper for a party/attorney to represent himself or herself in litigation.

## II. CONCLUSION

In short, it is respectfully submitted there is no issue which merits this Court's attention. The Court should not issue any extraordinary writ.

Respectfully submitted:
/s/Gary P. Paul
GARY P. PAUL
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SUSAN H. MELLO
**Attorneys for Respondent**

## CERTIFICATE OF SERVICE

Three copies of the foregoing instrument was served on William H. Viehweg, 114 West 2nd South, Mount Olive, Illinois 62069, by placing same in the U.S. Mail, postage prepaid, on the _____ day of _____,1998.

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[1]Contrary to Appellant's, impression, Respondent has never been associated with the U.S. Department of Justice and has at all times, been a private attorney.